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April 15, 1994

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Amendment of Table Of FM Allotments  
Key Colony Beach, Key Largo, and  
Marathon, Florida  
(MM Docket No. 93-136;  
RM-8161 and RM-8310)

Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client,  
Spanish Broadcasting System of Florida, Inc., licensee of Radio  
Station WZMQ(FM), Key Largo, Florida, are an original and four  
copies of its Contingent Opposition To Supplemental Joint  
Comments in the above-referenced FM channel allotment rulemaking  
proceeding.

Please direct any inquiries concerning this submission to  
the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &  
HANDLER

By:

Irving Gastfreund

Enclosures

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BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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APR 15 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)  
Of the Commission Rules  
Table of Allotments  
FM Broadcast Stations  
(Key Colony Beach, Key Largo  
and Marathon, Florida)

)  
)  
) MM Docket No. 93-136  
) RM-8161  
) RM-8310  
)  
)  
)

TO: Chief, Allocations Branch  
Mass Media Bureau

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CONTINGENT OPPOSITION TO SUPPLEMENTAL JOINT COMMENTS

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April 15, 1994

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**SUMMARY**

There is no merit to the Commenters' contentions in their Supplemental Joint Comments. Contrary to the Commenters' contentions, their proposed Fort Myers Villas channel cannot be allotted because of a site area unsuitability and unavailability. The Commenters' purportedly new and improved allotment reference point coordinates are as unsuitable as the Commenters' originally proposed allotment reference point coordinates, since the new reference point is located in the water. In addition, the Commenters' counterproposal would create little new service but would increase significant loss area.

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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APR 15 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)  
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Table of Allotments  
FM Broadcast Stations  
(Key Colony Beach, Key Largo  
and Marathon, Florida)

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) RM-8161  
) RM-8310  
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)

TO: Chief, Allocations Branch  
Mass Media Bureau

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CONTINGENT OPPOSITION TO SUPPLEMENTAL JOINT COMMENTS

SPANISH BROADCASTING SYSTEM OF FLORIDA, INC. ("SBS"), licensee of Radio Station WZMQ(FM), Key Largo, Florida, by its attorneys, pursuant to Section 1.45(a) of the Commission's Rules, hereby respectfully submits its instant Contingent Opposition with respect to the Supplemental Joint Comments filed in this proceeding on March 7, 1994, on behalf of Okeechobee Broadcasters, Inc. ("OBI"), licensee of Radio Station WOKC-FM, Indiantown, Florida; Sunshine Broadcasting, Inc. ("Sunshine"), licensee of Radio Station WSUV(FM), Fort Myers Villas, Florida; and Jupiter Broadcasting Corporation ("JBC"), permittee of Radio Station WADY(FM), Jupiter, Florida (collectively "Commenters"). In support whereof, it is shown as follows:<sup>1</sup>

<sup>1</sup> On March 17, 1994, SBS filed its Motion For Extension Of Time in which it requested an extension to and including April 15, 1994 within which to respond to the Commenters' submissions of March 7, 1994. As noted in that Motion For Extension Of Time, counsel for the Commenters indicated that he would not oppose the extension request. Accordingly, SBS' instant submission is timely filed.

## I. Introduction

This proceeding traces its origins to a Petition For Rulemaking filed on behalf of SBS almost one and one-half years ago, on December 17, 1992. On June 3, 1993, the Mass Media Bureau released its Notice Of Proposed Rule Making and Order To Show Cause, 8 FCC Rcd 3886 (Mass Media Bureau, Policy And Rules Division 1993). The Notice Of Proposed Rule Making, supra, specified that interested parties were authorized to file comments by no later than July 26, 1993 and reply comments by no later than August 10, 1993. Notice Of Proposed Rule Making, supra, at ¶11.

On July 26, 1993, the Commenters filed their Joint Comments And Counterproposal in this proceeding. That submission was accepted as a counterproposal in this proceeding by the Commission in its Public Notice of August 6, 1993 (Report No. 1958, Mimeo No. 34311) at 2. In short, the pleading cycle in this case has been completed since August 1993 -- i.e., almost eight (8) months ago. Nonetheless, on March 7, 1994, the Commenters filed their Supplemental Joint Comments in this proceeding, together with a contemporaneously-tendered Motion For Leave To File Out Of Cycle Pleading. In their latter submission, the Commenters seek leave to submit their Supplemental Joint Comments and seek to have the latter filing formally accepted in the docket in this proceeding.

In their Motion For Leave To File Out Of Cycle Pleading, the Commenters acknowledge that, under Section 1.415(d) of the

Commission's Rules, in notice and comment rulemaking proceedings such as the instant one, once the filing deadlines for submission of comments and reply comments has passed, no additional comments may be filed in the proceeding unless specifically requested or authorized by the Commission. The Commenters also recognize that any request for leave to file such an untimely and unauthorized pleading in this proceeding must be supported by an appropriate showing of good cause.

Contemporaneously herewith, SBS is filing its Opposition To Motion For Leave To File Out Of Cycle Pleading, in which SBS opposes the Commenters' Motion For Leave To File Out Of Cycle Pleading and in which SBS requests that the Commission summarily strike the entirety of the Commenters' Supplemental Joint Comments without any consideration whatsoever. SBS demonstrates in its Opposition To Motion For Leave To File that the Commenters' Supplemental Joint Comments are procedurally defective and that no good cause exists for acceptance of the Commenters' hopelessly late and dilatory Supplemental Joint Comments. SBS hereby submits its contingent Opposition with respect to the Commenters' Supplemental Joint Comments, out of an overabundance of caution, in the unlikely event that the Commission declines to summarily strike the Commenters' Supplemental Joint Comments. As shown below, there is no merit whatsoever to the factual allegations made by the Commenters in their Supplemental Joint Comments.

## II. Argument

### A. The Proposed Fort Myers Villas Channel Cannot Be Allotted Because of Site Area Unsuitability and Unavailability

In Amendment Of the Commission's Rules To Permit FM Channel and Class Modifications By Application, 8 FCC Rcd 4735, 73 RR 2d 247 (1993), the Commission reemphasized its long-standing policy that in channel allotment or channel change proceedings (both via rulemaking proceedings and via the recently-adopted so-called "one-step" class modifications by application), a proponent of an FM channel upgrade must

"... demonstrate that a suitable site exists which would comply with allotment standards with respect to minimum distance separation and city-grade coverage. ... In making this showing, an applicant must include a separate exhibit ... which shows that the allotment reference site would meet allotment standards with respect to spacing and city-grade coverage and that it would be suitable for tower construction. This exhibit must include a site map, or, in the alternative, a statement that the transmitter will be located on an existing tower. Generally speaking, examples of unsuitable allotment reference sites include those which are offshore, in a national or state park in which tower construction is prohibited, on an airport, or otherwise in an area which would necessarily present a hazard to air navigation. [Emphasis added.]"

Id., 73 RR 2d at 250 and n. 19.

Based on the foregoing long-established Commission policy involving channel change upgrades, SBS demonstrated in its August 23, 1993 Reply Comments in this proceeding that the Fort Myers Villas channel proposed by the Commenters cannot be allocated because there are no suitable non-short-spaced areas from which a proposed transmitter site for the station could provide line-of-



sight principal city coverage over the community of license (i.e., Fort Myers Villas). SBS demonstrated, in this regard, that all of the area in which a potential transmitter site could possibly be located was situated on Sanibel Island, Florida. SBS demonstrated that the entirety of the permissible site location area on that Island was adjacent to a sensitive wildlife area. SBS submitted a statement of the Manager of the refuge, in which he emphasized that the construction of a radio tower adjacent to the refuge would have a severe adverse impact upon Sanibel Island's wildlife, some of which is listed as threatened or endangered. The Manager further stated that the construction of such a tower would adversely impact the flight path of thousands of migratory birds, resulting in the death of many of the birds. Thus, SBS clearly demonstrated that the Commenters' channel proposal would inevitably have a major material adverse impact and would be strongly opposed by the U.S. Fish and Wildlife Service. In short, SBS clearly demonstrated that the Fort Myers Villas allotment reference coordinates utilized as the basis of the entirety of the Commenters' Counterproposal describe a site location area which can only be characterized as unsuitable and unavailable.

In this regard, SBS further demonstrated, in its Reply Comments, that Sanibel Island, Florida, is unavailable for the construction of radio towers, as shown clearly on the record in MM Docket No. 92-10, involving the rulemaking petition filed by Ruth Communications Corporation, permittee of Radio Station

WRWX(FM), Channel 253A, Sanibel, Florida, requesting the reallocation of Channel 253A from Sanibel to San Carlos Park, Florida. In Amendment Of FM Table Of Allotments (Sanibel and San Carlos Park, Florida), 7 FCC Rcd 850 (Mass Media Bureau, Policy and Rules Division, 1992), the Mass Media Bureau noted that the licensee of WRWX(FM) has been attempting to construct and operate that station at Sanibel since September, 1988, but that:

"... various federal, state and local authorities have objected to Petitioners' proposed transmitter sites. Petitioner states that local zoning ordinances prohibit construction of a tower on Sanibel Island, where Sanibel is located. The site petitioner originally specified in a 1983 application (BPH-830217AI) for the Sanibel allotment has been declared as environmentally sensitive wetlands and is no longer available, and the City of Sanibel has purchased surrounding property as a conservation area. No other site is available on Sanibel Island or nearby Pine Island for construction of a new tower. Operation from an existing tower on Pine Island or on the mainland is not possible because of short-spacing or other technical concerns. Petitioner states that she attempted to use a directional antenna for a site on Pine Island to avoid the short-spacing, but the proposed tower would be located near a bald eagle's nest. As a result, the Florida Game and Fresh Water Commission rejected the proposed tower. Petitioner claims that attempts to reach a compromise were unsuccessful. As a consequence, Petitioner has never operated Station WRWX(FM) at Sanibel. [Emphasis added.]"

Id., 7 FCC Rcd at 850.

SBS further demonstrated in its Reply Comments that the sole existing tower on the Sanibel Island, a cable television system headend tower, is not of sufficient height to permit line-of-sight principal community coverage to Fort Myers Villas, and is incapable of supporting additional weight.

After eight (8) months of cogitating on SBS' detailed showings, Commenters have not rebutted a single factual statement or showing made by SBS in its Reply Comments regarding the unsuitability of Sanibel Island and the unavailability of any area within which to locate the Fort Myers Villas station. Indeed, the Commenters appear to ignore the accuracy of the showings made by SBS regarding Sanibel Island by claiming that it is "irrelevant" that there are no tower sites on Sanibel Island. Supplemental Joint Comments at 2. Rather than defending the allotment reference point which formed the entire basis for the Commenters' channel allotment proposal for Fort Myers Villas in this proceeding, the Commenters have now decided to present a "moving target" by proffering yet a new, allegedly improved and purportedly acceptable allotment reference point. This new allotment reference point, at a swamp euphemistically known as Punta Rassa, has now formed the basis for an entirely new engineering submission and channel separation study, all of which was proffered by the Commenters some eight (8) months after the record in this proceeding was closed, and almost three-fourths of a year following the date on which acceptable counterproposals in this proceeding were required to be filed. By their submission of a completely revamped engineering showing, the Commenters have essentially conceded that their Counterproposal of July 26, 1993 was half-baked and fatally flawed.

The Commenters' belated Punta Rassa gambit works no better than their original Sanibel ploy. Annexed hereto as Exhibit 1 is

the Engineering Statement of Herman E. Hurst, Jr., of the firm of Carl T. Jones Corporation, consulting radio engineers to SBS. As is shown in Mr. Hurst's Engineering Statement, the reference coordinates for the Punta Rassa site upon which the Commenters now rely are slightly off the Punta Rassa shoreline and are actually located in the water in San Carlos Bay, Florida. As shown above, the Commission has recently reaffirmed that:

"Generally speaking, examples of unsuitable allotment reference sites include those which are offshore ...."

Amendment of the Commission's Rules to Permit FM Channel And Class Modifications By Application, supra, 73 RR 2d at 250 n. 19.

Mr. Hurst further notes in his annexed Engineering Statement that the simple reason that the reference coordinates relied upon by the Commenters stands as the allotment reference point for Channel 249A in Punta Rassa, Florida (a vacant channel) is that those reference coordinates were unopposed in MM Docket No. 87-169, in which the Punta Rassa channel was allotted, and the unsuitability of the coordinates was not brought to the Commission's attention in that proceeding. Indeed, as noted by Mr. Hurst, there are four pending applications for the Punta Rassa, Florida allotment, and yet not a single one of the four applications has proposed using the Punta Rassa reference point as its site. In fact, as Mr. Hurst's Engineering Statement and the attachments thereto demonstrate, all of the Punta Rassa applicants have chosen mainland transmitter sites. Furthermore, Mr. Hurst notes that, according to the most recent antenna tower database, there are no existing towers on Punta Rassa which are

within the permissible site area for the proposed Fort Myers Villas channel. In addition, Mr. Hurst demonstrates that any tower construction at Punta Rassa is not feasible due to environmental, local regulatory constraints and FAA constraints.

In short, notwithstanding the Commenters' claims to the contrary, a fully-spaced suitable allotment reference site does not exist for the Commenters' proposed Fort Myers Villas channel upgrade.<sup>2</sup>

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<sup>2</sup> The contentions advanced by the Commenters in footnote 1 on page 3 of their Supplemental Joint Comments are devoid of merit. The Commenters attempt to denigrate the showing made in Docket No. 92-10 with respect to the unsuitability of Sanibel Island as a transmitter site by speculating that the showings made by the Sanibel FM permittee in that proceeding were motivated by economic considerations wholly apart from technical considerations. This type of raw, unadulterated speculation and surmise must be summarily rejected; in any event, the speculations in question are completely irrelevant.

Similarly devoid of merit are the speculations and hearsay statements of Sunshine's principal, Jerry Bellairs (Supplemental Joint Comments at Exhibit 3) concerning unspecified "plans" regarding communications towers on Pine Island. Mr. Bellairs' statements constitute nothing more than undocumented and non-specific hearsay, both with respect to Pine Island communications towers, and with respect to purported discussions with unnamed "environmental officials". Furthermore, Mr. Bellairs' statements are not competent with respect to technical matters, since there has been no showing made that Mr. Bellairs is a qualified engineer. Accordingly, the entirety of Mr. Bellairs' declaration must be rejected out of hand. In any event, the availability vel non of a possible tower site on Pine Island is of absolutely no probative value in this proceeding, since SBS has previously demonstrated that the entirety of Pine Island, Florida, is located completely outside of the available site area of the proposed Fort Myers Villas channel. See SBS Reply Comments of August 23, 1993 at Attachment 1 (Engineering Statement of Herman Hurst), at Figure 2.

**B. The Commenters' Counterproposal Would  
Create Little New Service And A  
Significant Loss Area**

In its Reply Comments in this proceeding, SBS demonstrated that the Commenters' Counterproposal would create little new service but would increase significant loss area. In an attempt to mitigate the impact of this loss area, the Commenters point to the fact that, on December 8, 1993, the Commission granted a new construction permit to Radio Station WOKC-FM, Indiantown, Florida (BMPH-930809II), authorizing operations of the station as a Class C2 facility. However, no reliance may properly be placed by the Commission on the mere fact that this construction permit has been granted. There is no assurance that the facilities authorized in the WOKC-FM construction permit will ever be constructed, or, if they are constructed, when they will be constructed. There can be no assurance that the WOKC-FM construction permit will not be further modified by applications filed by the licensee of WOKC-FM. In short, unless and until WOKC-FM is actually licensed to operate with the Class C2 facilities authorized in the station's construction permit and the Commission's FM database is changed accordingly, no reliance may properly be placed upon the mere grant of the WOKC-FM construction permit as a basis for minimizing the significant loss area that would be generated by grant of Commenters' Counterproposal for Fort Myers Villas.

### III. Conclusion

In light of all of the foregoing, the entirety of the showings and allegations contained in the Commenters' Supplemental Joint Comments are devoid of merit and form no proper basis for grant of the Commenters' Counterproposal in this proceeding. Manifestly, the Supplemental Joint Comments must be viewed as a concession by the Commenters that their Counterproposal in this proceeding was fatally flawed, and therefore unacceptable, when filed with the Commission on July 26, 1993.

WHEREFORE, the foregoing premises considered, in the unlikely event that the Commission declines to grant SBS' contemporaneously-tendered Opposition To Motion For Leave To File Out Of Cycle Pleading directed against the Commenters' Supplemental Joint Comments and declines to summarily strike the latter submission without consideration for procedural deficiency, it is respectfully requested that the Supplemental

Joint Comments nonetheless be rejected out of hand as improper, dilatory, and totally lacking in any substantive merit.

Respectfully submitted,

SPANISH BROADCASTING SYSTEM  
OF FLORIDA, INC.

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By: 

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Its Attorneys

April 15, 1994



Exhibit 1



EXHIBIT 1

STATEMENT OF HERMAN E. HURST, JR.  
IN SUPPORT OF A  
REPLY TO SUPPLEMENTAL JOINT COMMENTS  
IN MM DOCKET NO. 93-136

Prepared for: Spanish Broadcasting Systems of Florida, Inc.

I am a Radio Engineer, an employee in the firm of Carl T. Jones Corporation, with offices located in Springfield, Virginia.

My education and experience are a matter of record with the Federal Communications Commission.

This office has been authorized by Spanish Broadcasting Systems of Florida, Inc. ("SBS"), licensee of WZMQ(FM), Key Largo, Florida, to prepare this statement and supporting figures in support of its Reply to Supplemental Joint Comments in MM Docket No. 93-136.

BACKGROUND

SBS is the petitioner whom initiated MM Docket No. 93-136 in an attempt to alleviate the effects of receiver-induced third order intermodulation interference (RITOI) occurring near the WZMQ(FM) multiple-use transmitter site [Radio Stations WZMQ(FM), 103.9 MHz, and WKLG(FM), Rock Harbor, Florida, 102.1 MHz, operate from a shared antenna]. The existence of this interference is documented in SBS' Comments in the instant proceeding.

STATEMENT OF HERMAN E. HURST, JR.  
REPLY TO SUPPLEMENTAL JOINT COMMENTS  
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On July 26, 1993, Okeechobee Broadcasters, Inc., licensee of WOKC-FM, Indiantown, Florida; Sunshine Broadcasting, Inc., licensee of WSUV(FM), Fort Myers Villas, Florida; and Jupiter Broadcasting Corporation, permittee of WADY(FM), Jupiter, Florida, (hereinafter "Commentors") filed *Joint Comments and Counterproposal* ("Joint Counterproposal") in MM Docket No. 93-136. The Commentors have advanced a five-channel facility change which conflicts with the SBS Petition to Amend the FM Table of Allotments ("SBS Petition"). The SBS Reply Comments, filed on August 23, 1993, demonstrated that the Counterproposal fails because a proposed channel change is not feasible; therefore the entire scheme of channel changes proposed by the Commentors is unacceptable. On March 7, 1994, the Commentors filed a *Motion for Leave to File an Out of Cycle Pleading and Supplemental Joint Comments* ("Joint Comments"). This material is in support of a Reply to the Joint Comments.

**THE COMMISSION'S "SOUND ALLOTMENT POLICY"**

The Commission most recently defined its "sound allotment policy" in its 1993 *Report and Order* concerning the one-step upgrade by application process<sup>1</sup>. In

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<sup>1</sup>See *Report and Order* concerning the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, MM Docket No. 92-159, Adopted June 4, 1993, Released July 3, 1993.

STATEMENT OF HERMAN E. HURST, JR.  
REPLY TO SUPPLEMENTAL JOINT COMMENTS  
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describing the exhibit which must accompany a "one-step" application to maintain the Commission's sound allotment policy, the Commission states:

An applicant must show that the allotment reference site would meet allotment standards with respect to spacing and city-grade coverage and that it would be suitable for tower construction...Consistent with existing allotment standards, the applicant is not required to submit a certification of site availability concerning the allotment reference site.

In the paragraph above, the Commission clearly differentiates between site suitability and site availability. The Commentors use the two terms interchangeably in their Joint Comments.

The Commentors' specified an unsuitable allocation reference site for the Fort Myers Villas upgrade. As a result, their proposal does not adhere to basic sound allotment policy. And, while it is true that the Commission has a policy of presuming site availability, that presumption may be rebutted by a "reasonable showing" that the applicant would be unable to obtain zoning approval (such as the letter from the City of Sanibel Planning Director included in the SBS Reply Comments as Figure 3)<sup>2</sup>. This fact was omitted in the Commentors' cite of *Heritage Broadcasting of North Carolina*.

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<sup>2</sup>See *Heritage Broadcasting of North Carolina*, 1 FCC Rcd 1012 (1986).

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REPLY TO SUPPLEMENTAL JOINT COMMENTS  
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**THE REFERENCE SITE FOR CHANNEL 275C2 AT FORT MYERS VILLAS IS UNSUITABLE.**

The proposed channel change and upgrade for Fort Myers Villas on Channel 275C2 is technically unacceptable because the reference coordinates specified for the upgraded channel to serve Fort Myers Villas define an unsuitable site upon Sanibel Island. The allotment reference site is in a sensitive wildlife area adjacent to the JN (Ding) Darling National Wildlife Refuge. Nothing in the Supplemental Joint Comments changed this fact; the reference coordinates for the Fort Myers Villas are unchanged and lie upon Sanibel Island in an unsuitable location. Therefore, the Counterproposal, as filed, is unacceptable.

In an attempt to confuse this simple fact, the Commentors raise a number of issues relating to the site *suitability* issue and a number of irreverent issues relating to site *availability* on Sanibel and Pine Island.

First, Pine Island is outside the Fort Myers Villas Class C2 permissible site area. Any references to suitable sites on Pine Island are irrelevant to this proceeding.

Second, any reference to the fact that a fully-spaced reference site exists on Punta Rassa for Channel 249A to serve Punta Rassa is irrelevant to this proceeding.

The unsuitability of the reference site for the Fort Myers Villas upgrade was originally introduced in the SBS Reply Comments. In order to de-emphasize the site's

STATEMENT OF HERMAN E. HURST, JR.  
REPLY TO SUPPLEMENTAL JOINT COMMENTS  
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unsuitability, the Commentors discussed, but did not amend to, an alternate reference site for the Fort Myers Villas upgrade on Punta Rassa. The irregular shape of the coastline, which defines the permissible site area on the mainland side of the Sanibel causeway, does not appear on computer-generated Lambert projection maps of the Florida Gulf coast; yet, as the Commentors assert, the 0.5 mile length of land does indeed exist. Regardless, this area is as unsuitable for an FM tower/transmitter site as any area on Sanibel. In fact, the reference coordinates for the Punta Rassa allotment which the Commentors now refer to as "suitable" are slightly off the Punta Rassa shoreline in San Carlos Bay.

The Commentors' statement that, "the Punta Rassa allocation point used by the Commission also works perfectly well for the proposed Fort Myers Villas station (emphasis added)", is misleading. Although the "point" may satisfy the Fort Myers Channel 275C2 minimum distance spacing and city-grade requirements, the "allocation point" does not satisfy the "allocation reference site" requirements because the point is in the water. Recently, the Commission specifically included offshore sites in an example of unsuitable allotment reference sites<sup>3</sup>.

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<sup>3</sup>See *Report and Order* concerning the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, MM Docket No. 92-159, Adopted June 4, 1993, Released July 3, 1993, Paragraph 19, Footnote 13.

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The simple reason that the site stands as the allotment reference site for the Punta Rassa Class A FM facility is that the reference coordinates were unopposed in MM Docket 87-169, and the unsuitability of the site was not brought to the Commission's attention.

Four applications were tendered for the Punta Rassa allotment. Each of the Punta Rassa proposed site locations, the Punta Rassa allotment reference point, and the Fort Myers Villas permissible site area are depicted on Figure 1. It is notable that none of the Punta Rassa Channel 249A applicants applied at or even in the near vicinity of the Punta Rassa reference point; all four applications are sited on the mainland. As mentioned above, the reference point is under water; and as to the tiny remaining area on Punta Rassa that is within the FM Fort Myers Villas site area, there are no existing towers according to the most recent antenna tower database. New tower construction is not feasible due to environmental and local permit restraints.

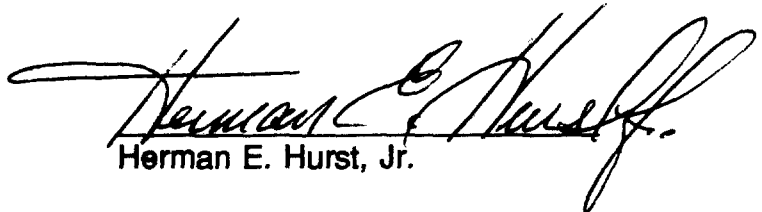
Based on telephone conversations with Robert Reppenning of the Florida Department of Environmental Protection on April 5, 1994, and Kim Dryden of the Florida Game and Fresh Water Fish Commission on April 7, 1994, a permit seeking authority to construct a tower along the shore of Punta Rassa would be opposed due to the negative impact upon bird migration routes (which follow the shoreline), proximity to existing eagle nests, and disruption of Mangrove swamp areas.

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In summary, the fatal flaw in the Commentors' counterproposal exists today as it has since the original filing of the Commentors' counterproposal; due to the environmental and zoning restraints over the entire permissible site area, a fully-spaced SUITABLE allotment reference site does not exist for the Fort Myers Villas proposed upgrade.

This statement and the supporting figures were prepared by me or under my direct supervision and are believed to be true and correct.

DATED: April 15, 1994

  
Herman E. Hurst, Jr.



**FIGURE 2**

